IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
CENTRAL EXCISE APPEAL NO.76 OF 2005

M/s.C.K.P.Mandal,
Tejpal Scheme Road No.4,
Vile Parle (E),
Mumbai-400 057. .. Appellant

v/s.

The Commissioner of Central Excise,
Mumbai-IV, Mumbai .. Respondent

Mr.Arun Sathe, Senior Counsel with Mr.S.S.Phadkar and Ms.Aarti Sathe and Mr.Mandar Vaidya for the appellant.

Mr.A.J.Rana, Senior Counsel with Mr.R.C.Master for the respondent.

CORAM : R.M. LODHA &
J.P.DEVADHAR, JJ.

DATED : 25TH APRIL, 2006.

ORAL JUDGMENT (Per R.M.Lodha, J.)

The following substantial questions of law arise in this appeal:

(i) Whether the consideration (donation or by whatever name called) received by the appellant from M/s.Saideep Caterers and

Decorators under the two separate contracts giving M/s.Saideep Caterers and Decorators monopoly rights for catering and decoration to the hirer of the appellant's hall (mandap) for official, social and business functions is chargeable to service tax within the meaning of section 65(90)(m) of the Finance Act, 1994?

(ii) Whether in the facts and circumstances of the case, the Customs, Excise and Service Tax Appellate Tribunal was right in law in holding that the appellant was rendering catering/decoration services within the meaning of section 65(90)(m) of the Finance Act, 1994?

2. The senior counsel for the parties agreed that the appeal may be heard and disposed of on the aforesaid two questions at this stage.

3. The appellant is a charitable trust registered under the Bombay Public Trust Act. It holds a building at Tejpal Scheme Road No.4, Vile Parle (E), housing two main halls on the ground and first floor and a small hall on the second floor. The halls on the ground and first floors are given by the trust on hire for

official, social and business functions. The appellant entered into two separate contracts thereby giving M/s.Saideep Caterers and Decorators (for short `Saideep Caterers') the exclusive rights for rendering the services of catering and decoration to the hirer using the said halls for official, social and business functions. Saideep Caterers in consideration paid a sum of Rs.8,35,000/- to the appellant in instalments between 26.5.2001 to 26.8.2002. A sum of Rs.9,80,000/- was also paid by Saideep Caterers to the appellant towards consideration during the period 1997-98 to 2000-2001.

4. The Superintendent, Service Tax, Central Excise Range-3, Mumbai-IV issued notice dated 19.2.2001 to the appellant regarding the service tax payable by the appellant on the aforesaid sum received from Saideep Caterers for the period from 26.5.2001 to 26.8.2002 and for the financial years 1997-98 to 2000-2001. The appellant paid the said amount and claimed for refund. That resulted in adjudication by the Assistant Commissioner of Central Excise vide order dated 22nd July, 2003. The Assistant Commissioner of Central Excise rejected the claim of the appellant for refund of the service tax.

5. The appellant preferred appeal before the Commissioner of Central Excise (Appeals), Mumbai-VI aggrieved by the order of the Assistant Commissioner of Central Excise dated 22nd July, 2003.

The said appeal came to be allowed vide order dated 17th December, 2003 and the order passed by the Assistant Commissioner of Central Excise dated 22nd July, 2003 was set aside.

6. The revenue went in appeal before the Tribunal. The Tribunal allowed the appeal and set aside the order dated 17th December, 2003 passed by the the appellate authority. The order of the Tribunal passed on 3rd November, 2004 is the subject matter of the appeal.

7. The Tribunal considered the terms and conditions of the two agreements entered into by the appellant with Saideep Caterers and held that the appellant was providing facilities of catering and decoration to their client in relation to the use of mandap. This conclusion was arrived at by the Tribunal in the backdrop that; (i) Saideep Caterers has exclusive right to render the services of catering and decoration at the rates mutually agreed and specifically mentioned in Schedule “A” attached to the agreements; (ii) the appellant cannot let out its halls to any such person who refuses to avail of the services of the Saideep caterers as and when such services are required and (iii) that the hirer is bound to avail of the catering and decoration services from Saideep caterers if such services are required by the hirer.

8. The correctness of the view of the Tribunal is in issue in this appeal. The two questions that arise in the appeal have been noticed by us at the outset. The answer to the aforesaid questions has to be found out from the statutory provisions and the two agreements entered into between the appellant and Saideep Caterers.

9. The statutory provisions relating to the service tax were inserted by way of Chapter V of the Finance Act, 1994 and Chapter V-B of the Finance Act, 2003. However, for the purposes of this appeal, we are concerned with Chapter V of the Finance Act, 1994 as amended from time to time.

10. Though the service tax was introduced in Chapter V of the Finance Act, 1994, the said Chapter has been amended from time to time bringing in various additional services under the net of taxable service. The definition of `taxable service' qua the service provided to the client by a `mandap keeper' in relation to the use of `mandap' and so also the definition of `mandap keeper', `mandap' and `caterer' for the relevant period with which this appeal is concerned remains the same but the number of the said clauses has changed because of additional services brought in. For the sake of convenience, we shall refer to the clauses in section 65 immediately prior to the amendment made in the financial year 2003.

11. Section 65 of the Act to the extent it is relevant for the purposes of this appeal reads thus-

> 65. "In this Chapter, unless the context otherwise requires,-
>
> .....
>
> (22) "Caterer" means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion;
>
> .....
>
> (54) "mandap" means any immovable property as defined in section 3 of the Transfer of Property Act, 1882 (4 of 1882) and includes any furniture, fixtures, light fittings and floor coverings therein let out for consideration for organising any official, social or business function;
>
> (55) "Mandap keeper" means a person who allows temporary occupation of a mandap for consideration for organising any official, social or business function;
>
> .....
>
> (90) "taxable service" means any service provided,-
>
> .....

(m) to a client, by a mandap keeper in relation to the use of mandap in any manner including the facilities provided to the client in relation to such use and also in services, if any, rendered as a caterer;

.....”

12. Section 67 provides for valuation of taxable services for charging service tax. According to it, in relation to the service provided by a mandap keeper to the client, the valuation of taxable services for charging service tax shall be the gross amount charged by such keeper from the client for the use of mandap including the facilities provided to the client in relation to such use and also the charges for catering, if any.

13. The halls on the ground and first floor belonging to the appellant which are given on hire for organising official, social or business functions are covered by the definition of `mandap'. In that context, the appellant is `mandap keeper'. The hire charges received by the appellant from hirer (client) for the use of halls for official, social or business functions shall be chargeable to service tax is not in dispute. This would also include the charges received from the hirer for the facilities provided by the appellant

in relation to such use. If the appellant provides service for catering and charges the hirer for catering, that would also form taxable service and chargeable to service tax. The question in this appeal is not about the hiring charges received by the appellant from the hirer permitting the user of the halls for official, social or business functions. The question in this appeal relates to the amount of consideration received by the appellant from the caterer (Saideep Caterers) to whom monopoly rights have been given by the appellant for providing catering and decoration services to the hirer if they so require. Can it be said that by according right of monopoly to Saideep Caterers to be the only caterer entitled to provide catering services and decoration to the hirer is the `taxable service' and the consideration received from Saideep Caterers is chargeable to service tax. The answer is plainly in the negative. The reason being that the taxable service in relation to the use of mandap (as defined) is the service to the hirer. The charges received from the hirer in relation to the use of mandap including the facilities provided to the hirer in relation to such use is a taxable service. If the appellant renders service as a caterer to the hirer, then such service is a taxable service. By entering into the two agreements with Saideep Caterers and giving them the monopoly to provide for catering and decoration to the hirer of the halls, cannot be said to be providing the service by the appellant to the hirer as a caterer. It is true that any person who supplies, either directly or indirectly any food, edible

preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accountrements for any purpose or occasion is a `caterer' within the meaning of section 65 but the appellant is not providing any direct or indirect service of any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accountrements to the hirer. The catering and decoration services to the hirer is provided by Saideep Caterers. By the said two agreements with Saideep Caterers it cannot be said that the appellant is providing indirect catering service to the hirer. It is not the case of the revenue that for the catering services provided by Saideep Caterers, the charges are received from the hirer by the appellant. The amount of Rs.8,35,000/- received by the appellant from Saideep Caterers for the period between 26.5.2001 to 26.9.2002 and an amount of Rs.9,80,000/- for the period between the financial years 1997-98 and 2000-2001 for giving them monopoly rights for rendering the services for catering and decoration to the hirer is not the amount received by the appellant from the client (hirer). The amount so received is from the third party (Saideep Caterers) who have been given monopoly rights to provide the catering and decoration services to the hirer though at the rates fixed in the agreements. There is no relationship of `mandap keeper' and the `client' between the appellant and Saideep Caterers. It is so because Saideep Caterers have been given monopoly rights to render the catering and decoration services to the hirer but Saideep Caterers has not

taken the halls on consideration for organising any official, social or business functions. The stipulation in the agreements that the appellant shall not give halls to any hirer who does not avail of the catering and decoration services of Saideep Caterers shall not mean that the appellant is a service provider to the Saideep Caterers.

14. Much emphasis was placed by the senior counsel for the revenue on the aspect that by giving monopoly rights to Saideep Caterers to provide catering and decoration services to the hirer of the Halls, the appellant is indirectly providing catering services to the hirer. He would submit that the expression “in relation to” is an expression of comprehensiveness in clause (m) of section 90 which will include the exclusive rights of catering and decoration given to Saideep Caterers by the appellant. We are afraid, the contention of the revenue cannot be accepted. It is true that under the two agreements entered into between the appellant and Saideep Caterers, the right to render the services of catering and decoration to the hirer has been given solely and exclusively to the Saideep Caterers. It is also true that rates for such services of catering and decoration to be provided by Saideep Caterers have been mentioned in Schedule “A” attached to the agreements. It is further true that the appellant has undertaken not to let out its halls to any such person who refuses to avail of the services of caterer from Saideep Caterers if such services are required by the

hirer. But that would not mean that the appellant is providing the services to the hirer as a `caterer'. What is of paramount importance for `taxable service' is the service provided to a client by the `mandap keeper' in relation to the use of `mandap' in any manner including the facilities of any nature but the service to be a `taxable service' must be a service provided to a client (hirer) by a `mandap keeper'.

15. Section 67 says that the valuation of taxable service for charging service tax shall be the gross amount charged by such mandap keeper from the client (hirer) for the use of mandap. The consideration received from the Saideep Caterers for giving monopoly rights is not the gross amount charged by the appellant from the hirer.

16. That the phrase “in relation to” has to be construed to the widest amplitude needs no elaboration. The expression “in relation to” is a very broad expression which may presuppose another subject matter. `In relation to' are words of comprehensiveness which might have both a direct significance as well as indirect significance depending on the context. The expression “in relation to” is used in the expansive sense. The same expansive meaning has to be given to the expression “in relation to” in sub-clause (m) of clause 90 of section 65. Howsoever, the expansive, wide and comprehensive meaning we

may give to the expression “in relation to” in sub-clause (m), the consideration received by the appellant from Saideep Caterers for giving them exclusive and monopoly rights for rendering the services of catering and decoration to the hirer of the appellant's hall shall not be covered by `taxable service' as defined in section 65.

17. In the context of the two agreements entered into between the appellant and Saideep Caterers, can it be said that Saideep Caterers have hired the `mandap' alongwith the actual hirer. The answer has to be `no'. The hirer is the person who hires the mandap for organising any official, social or business function. Saideep Caterers is not the person who has hired the halls for organising official, social or business functions. Saideep Caterers is not a client of the appellant in the sense the term “client” has been used in section 65.

18. In Commissioner of Income Tax, Bangalore v. B.C.Srinivasa Setty, 1981 (128) ITR 294, the Supreme Court held that the charging section and the computation provision together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case is not intended to fall within the charging section. Seen thus, section 65(90)(m) and section 67 have to be read together as they constitute one integrated code. Section 67 provides for

valuation of taxable service for charging service tax. In relation to service provided by mandap keeper to the client, the valuation of taxable service shall be gross amount charged by such mandap keeper from the client for the use of mandap including the facilities provided to the client. The consideration in question received by the appellant from Saideep Caterers is not the amount charged by the appellant from the hirer of the halls and, therefore, it is clear that the amount received from Saideep Caterers giving them monopoly rights for rendering services of catering and decoration to the hirer is not covered by section 67. Resultantly, such amount would not be chargeable to service tax.

19. We may now refer to the judgment of the Supreme Court in the case of Tamil Nadu Kalyana Mandapam Ass. v. Union of India and others, 2004(267) ITR 9. The Madras High Court dismissed the writ petition filed by the appellant-association challenging the constitutional validity of sections 66 and 67(o) of the Finance Act, 1994 and rule 2(1)(d)(ix) of the Service Tax Rules, 1994. The supreme Court upheld the judgment of the Madras High Court.

20. Mr.A.J.Rana, senior counsel for the revenue relied upon the following observations of the Supreme Court:

> "Similarly the services rendered by outdoor caterers are clearly distinguishable from the service rendered in a restaurant or hotel inasmuch as, in the case of

> outdoor catering service the food/eatables/drinks are the choice of the person who partakes of the services. He is free to choose the kind, quantum and manner in which the food is to be served. But in the case of a restaurant, the customer's choice of foods is limited to the menu card. Again in the case of outdoor catering, the customer is at liberty to choose the time and place where the food is to be served. In the case of an outdoor caterer, the customer negotiates each element of the catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalized service provided to the customer. Clearly the service element is more weighty, visible and predominant in the case of outdoor catering. It cannot be considered as a case of sale of food and drink as in restaurant. Though the service tax is leviable on the gross amount charged by the mandap keeper for services in relation to the use of a mandap and also on the charges for catering, the Government has decided to charge the same only on 60 per cent of the gross amount charged by the mandap keeper to the customer."

21. We are afraid, the aforesaid observations have no relevance to the questions involved in the present appeal.

22. Where the mandap keeper provides services including catering to the hirer of the mandap, needless to say, under section 65, such services are leviable to tax. But in a case like this where the appellant on the basis of the agreements entered into with Saideep Caterers, asks the hirer to take catering and decoration services, if needed, from Saideep Caterers alone, it cannot be said that the appellant has provided catering service indirectly to the hirer. The appellant has not charged the hirer of the halls on that account.

23. In what we have discussed above, answer to the aforesaid two questions has to be in the negative and we hold so.

24. The result is that the appeal is allowed and the judgment of the appellate tribunal passed on 3.11.2004 is set aside. The parties shall bear their own costs.

25. Mr.A.J.Rane, senior counsel for the revenue orally prays for stay of this order. Mr.Arun Sathe, senior counsel for the appellant submits that for a period of three months, the appellant shall not insist for refund of the amount from the revenue. We accept the statement of the senior counsel for the appellant and in view thereof, no order as prayed for by Mr.Rana.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)